

**DUE PROCESS HEARING PANEL
MISSOURI STATE BOARD OF EDUCATION
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

,)
by his parent,)
,)
)
Petitioners,)
)
vs.)
)
CAMDENTON R-III SCHOOL DISTRICT,)
)
Respondent.)

DECISION COVER SHEETS

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f) (1997), and Missouri law, §162.961.3 RSMo.

THE PARTIES

Student:

Petitioner: Mother,

Respondent: CAMDENTON R-III SCHOOL DISTRICT.

The petitioner was not represented by counsel.

The school district was represented by:

Teri B. Goldman
Attorney at Law
36 Four Seasons Center, #136
Chesterfield, MO 63017.

HEARING OFFICERS:

Kenneth M. Chackes	Hearing Chair
Dr. Margie Garanzini-Daiber	Panel Member selected by parents
George Wilson	Panel Member selected by school district

RELEVANT DATES

Request for due process hearing: June 16, 2004.

Dates of hearing: April 25-27, 2005.

Date of Decision: July 22, 2005.

Explanation of deviation from 45 day time-line:

The parent submitted a request for a due process hearing which was received by the Missouri Department of Elementary and Secondary Education (DESE) on June 16, 2004. The original deadline for hearing the case and completing and mailing a written decision, therefore, was August 2, 2004, 45 days from the date DESE received the request.

In order to comply with that deadline, on July 17, 2004, the hearing chair scheduled the hearing for July 26, 2004. On July 13, 2004, however, the school district indicated it would not be ready for a hearing during July, as the special education director and teachers were not under contract and the district's attorney had not had an opportunity to review the student's records or speak to the staff. The district requested an extension of the deadline for decision "until at least September 30, 2004." On July 15, 2004, the hearing chair conducted a telephone conference with the parent and the attorney for the school district. After discussing dates that they could both be available, and considering schedules, the hearing chair and the parties agreed that the hearing could be held on August 18-19, 2004, if the school district staff could be available, or, in the alternative, September 29-30, 2004. Later that day the district's attorney informed the hearing chair that the district opposed the hearing on August 18-19, as staff would return to work on August 17 and critical special education inservices were scheduled for August 18-19. The district agreed to a hearing on September 29-30, 2004, and requested that the decision deadline

be extended to November 15, 2004. On July 23, 2004, the hearing chair entered a Scheduling Order establishing those dates.

On September 5, 2004, the district requested a continuance of the hearing for several reasons: counsel's belief that more than two days would be needed for the hearing, the district's concern whether [mother] is the proper party "parent" to initiate a due process request, the fact that the parent recently had surgery and might need time to recover, and to allow for the completion of an independent educational evaluation that had been requested by the parent and agreed to by the district. The hearing chair conducted a telephone conference with the parent and the district's attorney, Teri Goldman, on September 9, 2004. The parent agreed to the district's request for a continuance, at least in part because she wanted to complete the independent evaluation before the hearing. The parent indicated she would not oppose a continuance even if it delayed the hearing until December or January. Also on September 9, 2004, by letter to the parties, the hearing chair granted the district's request to extend the deadline for completion of the decision to December 6, 2004, and began the process of finding dates for the hearing, in November, December or January, on which all of the parties and hearing panel members would be available. On October 3, 2004, Ms. Goldman advised that because she had due process hearings scheduled through the months of October through December, she was requesting, on behalf of the district, that the hearing be scheduled during January 2005, with the district's preference for the week of January 10, 2005. The district also requested that the deadline for decision be extended to March 1, 2005. Based upon the district's requests, the agreement of the parent, and the availability of the hearing panel, the hearing was scheduled for January 10-13, 2005, and the deadline for decision was extended to March 1, 2005.

On December 31, 2004, the parent requested a continuance of the hearing, for reasons relating to her health. On January 3, 2005, the hearing chair granted that request and asked the parent to let him know when she would be available. In early February both parties contacted the hearing chair about scheduling the hearing. After consulting with both parties and the hearing officers, the hearing chair determined that all were available on April 25-27, 2005. At the request and with the consent of both parties, the hearing chair extended the deadline for decision to May 31, 2005.

At the close of the hearing on April 27, 2005, the parties and the hearing panel discussed the schedule for submitting post-hearing written briefs and for the completion and mailing of the decision. Based upon the parties' requests and agreement, the hearing chair ordered that the parties may submit a brief by June 6, 2005 and extended the deadline for completion and mailing the decision to July 1, 2005.

DECISION

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f) (1997), and Missouri law, §162.961.3 RSMo.

STATEMENT OF ISSUES

The parent submitted her due process hearing request on the model form provided by the Missouri Department of Elementary and Secondary Education, along with two attached letters. Ex. R-36, 608-11. In at least one pre-hearing conference, which is not on the record, the parent, the school district attorney, and the hearing chair discussed the issues the parent wished to raise. At the beginning of the hearing, the parties and the hearing panel extensively discussed the issues that the parent sought the panel to determine. Transcript (“Tr.”) 13, 17-64. The panel then met separately and created a document that reflects the issues that the panel determined it would and would not decide. Panel Ex. 1.

The hearing panel determined it would consider the following issues and allegations raised by the parent regarding the April 2004 Individualized Education Program (IEP):

1. Whether the IEP denied the student an appropriate education because it provides too much time in transition activities and not enough time in
 - speech and language therapy, and
 - special education for reading, writing, spelling, and math;
2. Whether the district violated the student’s rights under the IDEA because the speech and language service provider was not licensed;

3. Whether the district denied the student an appropriate education because it provided reading instruction that was not appropriate to meet the student's needs (question of using phonics for reading instruction could be considered regarding the remedy);
4. Whether the district denied the student an appropriate education by not providing more 1-1 instruction;
5. Whether the district violated the IDEA by not calling off the 4/04 IEP meeting at parent request; and
6. Whether the district violated the IDEA by not allowing the parent to tape record the 4/04 IEP meeting.

The hearing panel ruled that it would not consider the following issues raised by the parent because they were not raised properly or are they do not allege violations of the IDEA or Missouri's special education law:

1. Whether the district refused an independent evaluation. The panel determined that was not a proper issue because the parties agreed that the district had granted the parent's request for an independent evaluation, and one was completed, in 2004.
2. No letter grades on IEP goals. The panel determined that was not a proper issue as it does not allege a violation of the IDEA.
3. Whether Tammy Lupardus, district special education director, was not responding to the parent in a positive manner. The parent did not allege that Ms. Lupardus's behavior interfered with the parent's right to participate in matters related to the student's

education. The panel determined, therefore, that the issue of Ms. Lupardus's behavior did not allege a violation of the IDEA.¹

4. Issues relating to No Child Left Behind. The panel determined that it had no jurisdiction to determine issues under the No Child Left Behind Act.

FINDINGS OF FACT

1. The parent submitted a request for a due process hearing which was received by the Missouri Department of Elementary and Secondary Education (DESE) on June 16, 2004. After a number of postponements, which are described in the accompanying materials, the due process hearing was held on April 25-27, 2005. At the hearing, the parent testified and also called Gerry Gaspar to testify. The parent also stated that she had other witnesses she might want to call, but who were not available at the time of the hearing. The hearing chair offered the parent the opportunity to postpone the completion of the hearing to allow them to testify, but the parent declined that invitation. Tr. 5, 6, 46, 73, 104, 209, 406, 419, 537. The district presented the following witnesses who have participated in planning and implementing the student's educational program: Kristy

¹ A hearing panel or court can set aside an educational program on procedural grounds in any one of three circumstances: (1) when the procedural inadequacies have "compromised the pupil's right to an appropriate education," (2) when the district's conduct has "seriously hampered the parent's opportunity to participate in the formulation process," or (3) when the procedural failure has resulted in "a deprivation of educational benefits." *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir. 1996).

Kindwall, JoLynn Johnson, Karin Long, Dave Tyler, Bonnie Leuwerke, Kim Burns, and Tammy Hutchison-Lupardus.

2. At the time of hearing, the student was a tenth grade, high school aged male, who resided in and attended the Camdenton R-III School District. Tr. 212.
3. The student has a disability under the IDEA and the Missouri State Plan for Part B of the IDEA. The school district diagnosed the student under the IDEA as language impaired. Ex. R-36 at 230; Tr. 213. The student also has a medical diagnosis of severe verbal apraxia. Tr. 215-17. Verbal apraxia – also known as apraxia of speech – is an impairment in the sequencing of sounds. Tr. 386. It is a neurological disorder that interferes with a person’s ability to correctly pronounce sounds and words. Petitioner’s Exhibit (“Pet. Ex.”) “What’s Apraxia” at 2. Apraxic speakers make may several attempts at a word before they get it correct. Tr. 386. The student’s disability also impacts his intelligibility, a listener’s perception of him and interferes with his communication. Tr. 213-14. Apraxia is not a separate educational diagnosis under the IDEA, but the district has recognized that he has apraxia and provided educational services to him that address his apraxia. Tr. 215, 334.
4. The student also demonstrates difficulty with short-term memory and with retention, recall and retrieval of information. Tr. 213. He has limited expressive language and the oral language that he uses tends to be telegraphic, in that he states only main points. Tr. 214. However, the student often is able to convey meaning with that telegraphic language. Tr. 214. The student’s disability also impacts him academically. Tr. 214.

5. The student's speech and language did not develop normally and he received speech and language services from the First Steps program from the age of two to three. Tr. 81; Ex. R-16 at 230. Public schools in Missouri have identified and served the student as a child with a disability since the age of three. Tr. 89; Ex. R-16. When he was a young child, either three or five years old, the student fell in a barn and had a concussion. Tr. 89, 106-07; Ex. R-1 at 1. Following that incident the student had a period of seizures. Tr. 106-07. The district's assistant special education director, Kristy Kingwall, testified that the IDEA diagnosis of traumatic brain injury might better explain the student's deficits, but the district lacked sufficient medical information to support that diagnosis. Tr. 217-28, 338-39, 341-43; Ex. R-47.
6. The student and his parent moved to the Camdenton School District for his fourth grade year where he continued to be identified as language disordered. Ex. R-16 at 231; Tr. 98-99, 336. He attended the Camdenton School District from the fourth grade through the tenth grade in which he was enrolled at the time of hearing. Tr. 212-13.
7. In January 2001, the Camdenton District reevaluated the student and continued to diagnose him as language impaired. Ex. R-16 at 231. On or about September 10, 2001, Rusk Rehabilitation Center, in Columbia, Missouri, evaluated the student's speech and language abilities. Ex. R-8 at 113; Tr. 121. As a result of that reevaluation, Rusk diagnosed the student with verbal dyspraxia² and an expressive and

² Rusk explained that "[t]he terms verbal dyspraxia and apraxia of speech are used interchangeably to mean 'difficulty in the ability to program purposeful oral-muscular movements while involuntary movements remain intact, resulting in the disintegration of speech sound and combinations to form syllables and words.'" Ex. R-8 at 121.

receptive language disorder. *Id.* The parent requested the evaluation based on her uncertainty with respect to a prior diagnosis of verbal dyspraxia. *Id.*

8. The Rusk evaluation also notes that the student's mean length of utterance was very short (2.81 words). Ex. R-8 at 120. In addition, Rusk personnel noted that the student's severe deficits in reading and his difficulties with phonics were likely to be secondary to the negative impact of dyspraxia on phonological awareness. *Id.* at 120.
9. The student continued to attend the Camdenton School District during his eighth grade year. Ex. R-16 at 231. During that year, he received academic instruction on an applied level in the special education classroom. Ex. R-16 at 231. He also received speech and language therapy for 150 minutes per week. The student continued to be very delayed in academics and had difficulty comprehending information in his core classes. Ex. R-16 at 231. In reading, he continued to work on letter identification and first grade sight words. *Id.* at 232.
10. During the 2003-04 school year, the student was enrolled as a ninth grade student in the Camdenton District. Ex. R-16 at 232. In January 2004 the Camdenton R-III School District conducted a reevaluation of the student. Ex. R-16 at 230; Tr. 227-33. The district's evaluation report includes background information from prior evaluations as well as information collected from new assessments. Tr. 234-35; Ex. R-16 at 230. As part of that reevaluation, the district administered the Brigance Life Skills Inventory and Brigance Inventory of Basic Essential Skills. Ex. R-16 at 244. The administration of those tests showed that the student could read limited words and could recognize some functional signs. In addition, he scored below a first grade level in math computation.

He could provide his phone number, but was unsure of his address or zip code. At that time, he was able to name all of the letters and recognized money. Ex. R-16 at 244. In the conclusion of the evaluation report, the team determined that the student continued to meet the state criteria for a diagnosis of language impairment. Ex. R-16 at 257; Tr. 235.

11. In January 2004, the student's IEP team developed a new IEP for him based on the reevaluation. Ex. R-12 at 263-79; Tr. 235-36, 239. The parent attended and participated in that meeting. Tr. 236. The January 2004 IEP addresses the student's language and speech deficits as well as his academic deficits in reading, writing and math. Tr. 236-38. At the parent's request, the IEP team increased the student's time in speech and language therapy. Tr. 238. Although the district's educators did not believe that the student needed that increase, the team agreed to increase the minutes and to collect data to demonstrate to the parent that an increase in the student's therapy time would not result in greater progress in those areas and to lay a foundation for a more functional approach to the student's next IEP. Tr. 223, 238-39, 242. The team agreed to reconvene at a later time to review the data collected. Tr. 242-43. The staff testified that the data collected supported the staff's hypothesis and showed that the additional minutes did not result in greater progress. Tr. 223, 239. In addition, a subsequent interview with the ninth grade speech therapist revealed that, during the time the minutes were increased, the student stopped participating in his therapies. Ex. R-18 at 284; Tr. 239-40.
12. In March 2004, the parent stated her disagreement with the district's reading evaluation and orally requested an independent evaluation. R-18 at 312; Tr. 507-08. The district

granted the parent's request for a publicly funded independent evaluation of the student.

Id.

13. On or about March 18, 2004, the district provided the parent with a written notification for an IEP meeting for March 29, 2004. Ex. R-25 at 387; R-19; Tr. 243, 273, 331, 416. On or about March 29, 2004, the parent requested that the meeting be rescheduled so that her advocate and friend, Danny Reed, could attend. R-19; R-25 at 388; Tr. 243, 333, 416. On or about April 2, 2004, a second written notification was provided, rescheduling the meeting for April 27, 2004. Ex. R-19 at 334; Ex. R-25 at 386-88; Tr. 273.
14. On or about April 27, 2004, the student's IEP team met to prepare an IEP for him. Ex. R-25 at 362; Ex. R-24 at 357, 257; Tr. 244. The meeting lasted for approximately 2 ½ hours, a longer time than the typical IEP meeting. Ex. R-27 at 415; Tr. 280, 415. The parent participated in that meeting. Tr. 126, 245. The following individuals also participated in the meeting at the parent's invitation: Carrisa Ash (Sylvan Learning Center representative), Danny Reed and Gerry Gasper (the parent's friends and advocates); and Victoria Van Ness (Rolla Regional Center). Ex. R-25 at 362; Tr. 126-27, 245, 257. Each of those individuals was allowed to participate. Tr. 245.
15. At hearing, the parent testified that, after she came to the meeting, she discovered that one of her advocates, Shelley Barrett, was unable to attend because her son had been in an accident. Tr. 412-13. She testified that she requested to postpone the meeting, but was informed that the meeting would continue without her if she left. Tr. 412-13. The parent acknowledged at hearing that she had other advocates present and that she and the other advocates remained for the meeting. Tr. 413-14. Tammy Hutchison-Lupardus, the

district's Director of Special Services, confirmed that she also attended the April 2004 IEP meeting. Tr. 502. She did not recall that the parent requested a postponement of the meeting, but she did remember informing the parent that, if she chose to leave the meeting, the meeting would continue without her as the district had provided at least the requisite two notifications. Tr. 503-04. After that discussion, the parent elected to stay and participated in the remainder of the meeting. Tr. 503-04. The parent also requested to tape record the meeting, but was informed that taping was against district policy. Tr. 412-13, 502-05.

16. Although the parent had Carissa Ash from Sylvan Learning Center attend and participate in the April 2004 IEP meeting, the parent did not request that the IEP team or the district provide the student with any services from Sylvan. Tr. 245-36, 256, 512. Ms. Ash did present a Sylvan report and implied that Sylvan could remediate the student's math and reading deficits to grade level. Ex. R-22 at 345-54; Tr. 246. Ms. Ash did not indicate precisely what the grade level expectation was for the student, did not demonstrate any grasp of the student's disability or how the disability impacted him, or what his IEPs provided. Tr. 247. In addition, Ms. Ash did not present any information with respect to the qualifications or training of Sylvan staff in the areas of special education. Tr. 247. Although Mr. Gaspar testified at hearing that all of the Sylvan staff had doctorate level degrees, Tr. 178-79, the Sylvan information presented by way of the parent's evidence showed that none had doctorate degrees and none had experience in the field of special education. Tr. 256-27.

17. The Sylvan report showed goals for the student that appeared generic in nature and were not individualized to his needs. Tr. 251-52. As a result, district personnel did not find them appropriate. Tr. 248, 250-52. The district also presented the testimony at hearing of Bonnie Leuwerke, one of the district's special education teachers who served the student during the 2004-05 school year. Tr. 476-77. Ms. Leuwerke was employed by Sylvan Learning Centers for about 1½ years in 1997 and 1998. Tr. 480, 488. At that time, Sylvan utilized a standard curriculum for all students who attended there and the instructors were not allowed to individualize that curriculum for students with disabilities. Tr. 480-81. In Ms. Leuwerke's opinion, that standard curriculum was not appropriate for the student. Tr. 481. In addition, Ms. Leuwerke testified that Sylvan, at that time, did not permit students to be instructed on a 1:1 basis. Rather, the student teacher ratio generally was approximately 3:1. Tr. 480.
18. The IEP team developed a new IEP for the student on April 27, 2004. Ex. R-25 at 362. The IEP contains goals and objectives in functional reading, math and writing and in speech and language. Ex. R-30 at 367-370; Tr. 252-66. The IEP calls for a self-contained special education placement, with the focus on a life skills curriculum. Ex. R-30 at 374. The IEP provides for the student to receive 100 minutes per week of speech-language therapy and 30 minutes a week of speech-language consultation. Ex. R-30 at 375; Tr. 240-41. The IEP also provides, as support for school personnel, that the speech-language pathologist will train all teachers and paraprofessionals that work with the student to generalize language in all of his settings. Ex. R-30 at 373; Tr. 266-27.

19. The April 2004 IEP represents a shift in philosophy to an approach where the student could learn in and apply what he learned to real life situations. Tr. 260-61.
20. The district provided the parent with four notices of action regarding the requests made by the parent at the April 2004 IEP meeting. Ex. R-25 at 394; Tr. 504-05. The district refused the parent's request to tape record the IEP meeting based on the existence of a board policy that prohibited use of recording devices at IEP meetings. Ex. R-25 at 394; Tr. 504-05. The district also refused the parent's request for a reading evaluation based on the fact that the district had already conducted reading assessments and the district planned to continue to assess the student's reading in an ongoing fashion. Ex. R-25 at 398; Tr. 505. In addition, the district's notice of action regarding the parent's request for a reading evaluation noted that the district previously had agreed to fund an independent evaluation and that the parent could have the student's reading assessed through that process. Ex. R-25 at 398. The district also refused to change the student's educational diagnosis to "verbal apraxia" as that term is a medical diagnosis that is not permissible under the Missouri State Plan for Special Education. Ex. R-25 at 401. The district further refused a request for a mechanical hands-on assessment of the student. Ex. R-25 at 400; Tr. 505.³

³ During the 2004-05 school year, the district administered a vocational evaluation to the student that was required for consideration of the district's vocational program. Tr. 294-95. That evaluation was not completed pursuant to the IDEA, but could be considered by the student's IEP team. *Id.* The evaluation did encompass the area of mechanical aptitude. *Id.*

21. During the 2004-05 school year, the student attended the Camdenton School District as a tenth grader and the April 2004 IEP was implemented throughout the year. Tr.261, 270. The student participated in a life skills class that incorporated reading, writing, language and math within the life skills curriculum. Tr. 271. The district provided special education instruction to the student, and also worked on his language needs, in an intensive reading and writing class. Tr. 271. The district utilized Karin Long, as a speech implementer, to provide speech-language therapy. Tr. 271-72. In addition, Ms. Long went into the student's classrooms to consult with other staff and assist with the student's generalization of skills. Tr. 272. The district also placed the student in a transition class that addressed careers and employability along with reading, writing and math in a functional manner. Tr. 272-73. The transition teacher also reinforced the student's speech-language skills. Tr. 273.
22. On or about August 31, 2004, and again on or about April 1, 2005, the district administered the Reading Milestones Placement Test to the student. Ex. R-44 at 789-90; Tr. 288. Those test results show that the student made meaningful progress in reading during the 2004-05 school year. *Compare* R-44 at 789- with 790; Tr. 288-89.
23. In October 2004, the parent had an independent evaluations completed for the student at the University of Missouri – Columbia. Pet. Ex. "Columbia Evaluation;" Ex. R-30 at 429-51; Tr. 143, 283. The district paid for those evaluations as it had agreed to do in March 2004. Tr. 511; R-18 at 312. The evaluation report from the University's Assessment & Consultation Clinic in the College of Education noted that the student received very low scores in the area of working memory and stated that his memory

difficulties might be contributing to his academic problems. Ex. R-30 at 433, 437. That report also suggested that another underlying reason for the student's academic difficulties other than his language impairment might exist. Ex. R-30 at 437. On the topic of reading instruction, the University report indicates that the student has difficulty sounding out words and recognizing letter-sound relationships and that his decoding difficulties might be the result of "a lack of phonological awareness." Ex. R-30 at 439. It recommends that because of the student's "strengths in the visual and nonverbal domain, his reading instruction should . . . include multi-sensory reading activities." *Id.* The report also recommends instruction focused on functional and adaptive skills. Ex. R-30 at 440.

24. In October 2004, the parent also obtained an independent evaluation of the student's speech-language skills at the University of Missouri's Speech and Hearing Clinic. Pet. Ex. "Columbia Evaluation;" Ex. R-30 at 443-51; Tr. 143, 283. The report of that evaluation agreed with previous assessments that the student's speech difficulties were consistent with a diagnosis of developmental verbal apraxia. Ex. R-30 at 450. The evaluation recommends functional goals for the student's IEP and an emphasis on functional academics. Ex. R-30 at 450-51.
25. On or about December 9, 2004, district staff met and considered the independent evaluations that the parent had provided. R-30 at 426, Tr. 283, 286. The parent was given an opportunity to participate in that meeting, but did not do so. Tr. 284. In a written report that reflects the consideration, the team concluded that the strategies being employed pursuant to April 2004 IEP were consistent with the recommendations of the

independent evaluation. Ex. R-30 at 427; Tr. 285. More specifically, the April 2004 IEP focused on functional academics and transition skills, consistent with the University of Missouri independent evaluation. Ex. R-30 at 427; Tr. 285. Because the independent evaluation was consistent with the April 2004 IEP, the team did not revise the IEP. Tr. 285. The parent did not make any requests based on the independent evaluations. Tr. 285, 511.

26. At the hearing, the parent testified on her own behalf. The parent testified that she now agrees that the student is apraxic and that the apraxia affects his ability to retain information and concepts. Tr. 100. She also testified that she agrees that his disability is severe. Tr. 117. The parent agreed that it is important for the student's IEPs to address reading, writing, math, speech and language based on her opinion that the apraxia impacts each of those areas. Tr. 118-19. The parent wants the student to receive a greater, but an unspecified, amount of 1:1 time in reading and speech-language therapy. Tr. 132, 411. The parent acknowledged, however, that she had never made this request of the IEP team. Tr. 409-10. The parent acknowledged that whether the student liked or disliked his teacher was an important factor in whether he made progress, and testified that he works well with Karin Long. Tr. 103, 134. She also testified that the student had made a lot of progress in the Camdenton district, particularly when compared to his progress while in the Union School District. Tr. 107, 115. Indeed, she testified that he had made more progress after implementation of the April 2004 IEP than he had on past IEPs. Tr. 135. The parent testified that she agreed with the University of Missouri recommendation for a functional approach to reading. Tr. 146.

27. Gerry Gaspar also testified on behalf of the parent. Tr. 153. Mr. Gaspar has no formal credentials in the field of education and no training in the teaching of reading. Tr. 161. Ms. Gaspar met the student's family in 2000 and has attended two or three of the student's IEPs. Tr. 160, 169. Mr. Gaspar has worked closely with the student on his reading skills, and has provided a great deal of support and encouragement to the student and the parent with regard to the student's education.
28. Kristy Kindwall testified for the district. Ms. Kindwall is the district's Assistant Director of Special Services. Ms. Kindwall testified that, because of the student's short-term memory issues, the district cannot appropriately use traditional instructional techniques with the student. Tr. 219. For the student to make progress, his teachers need to use a multi-sensory approach and the skills being taught must be meaningful and relevant to the student. Tr. 219. If the area of instruction is not meaningful, the student shuts down and refuses to participate in his learning. Tr. 219. During the 2004-05 school year, the district created situations for the student that were meaningful and required him to use more language in all settings and with all persons. Tr. 220. A mentoring situation was established with a disabled elementary student that was meaningful for the student as was a work-study situation that was created for him in the cafeteria. Tr. 220-21. Each of those strategies was effective for the student and resulted in an increase in his mean length of utterance. Tr. 221, 232.
29. Ms. Kindwall testified that she disagreed with the parent's request for an increase in the time that the student received speech and language therapy. Tr. 222. In the past, the student had resisted and refused to participate when his time in therapy was increased

- because he saw no meaning or relevance in those sessions. Tr. 222. When the student becomes resistant to a strategy that is being employed, he does not make progress. Tr. 223. In addition, the student refuses to use strategies that the parent has not supported such as sign language and, when parental support is withdrawn, the strategy has become ineffective. Tr. 224-26; *see also* Ex. R-6 at 97. Ms. Kindwall also testified that the student requires a relationship with his teachers before he can make progress. Tr. 274.
30. Ms. Kindwall testified that, during the 2004-05 school year, the district began using the Reading Milestones curriculum with the student. Tr. 276. That curriculum was created for students with language difficulties and is multi-sensory and, in her opinion, that approach has resulted in the student's greater progress in reading and language. Tr. 276. Ms. Kindwall further testified that, in the past, the district had used a more traditional phonics-based reading program with the student, but that such a curriculum used exclusively was not appropriate for the student or he would have made greater progress over time. Tr. 275-76. Ms. Kindwall stated that an auditory phonics-based program was not appropriate for the student because of his diagnosis of verbal apraxia. Tr. 275-76.
31. Ms. Kindwall testified that, because of the new, more functional approach that the IEP team took with the April 2004 IEP, the student was positively responding and making greater progress in all areas. Tr. 232, 274, 290-91. Through that IEP, the student was receiving large amounts of small group instruction and individualized instruction in reading, writing, math, speech and language. Tr. 290-91. The transition class was giving the student the opportunity to apply all the learned skills to real life situations. Tr. 290-

91. In Ms. Kindwall's opinion, removal of that class as the parent requested would not be positive for the student. Tr. 290-91.
32. JoLynn Johnson also testified on behalf of the district. Tr. 377. Ms. Johnson is a speech-language pathologist with ten years of experience in the field. Tr. 378. She testified that the State of Missouri recognizes the speech implementor model that the district uses. Tr. 379. Ms. Johnson supervises Karin Long, the speech implementor who works with the student. Tr. 380. Ms. Johnson testified that Ms. Long exceeded the minimum qualifications to serve as a speech implementor and that Ms. Long was well qualified to provide speech-language therapy to the student. Tr. 380. Ms. Johnson testified that, after Ms. Long began providing his therapy, the student began engaging more in conversation, began asking more questions and making greater progress. Tr. 382-85. In addition, Ms. Johnson testified that the minutes of speech-language therapy in the student's April 2004 IEP were appropriate for him. Tr. 391-92. She further testified that the data collected by the district supported the conclusion that greater minutes did not and would not result in greater progress. Tr. 391-92.
33. Karin Long also testified for the district. Tr. 420. Ms. Long has a Bachelor's Degree in Science and Electronic Communication Technology and a Master's Degree in Speech and Hearing. She is certified to teach in deaf education, early childhood and special education. Tr. 42. Ms. Long has nine years of experience in public school education. Tr. 424. Ms. Long met the student and began working with him in September 2004. Tr. 424. During the 2004-05 school year, she worked with him for 20 minutes per day in speech-language therapy. Tr. 424. The therapy occurred in a small group setting and

Ms. Long provided some 1:1 instruction to the student within that setting. Tr. 431, 457.

In Ms. Long's opinion, isolated 1:1 instruction would not be beneficial or effective for the student in increasing his language skills and the minutes of therapy provided in the April 2004 IEP were appropriate for the student and did not need to be increased. Tr. 432-34. In addition, Ms. Long supervised the student for 90 minutes per week in a mentoring situation with an elementary student. Tr. 425-27, 450.

34. During the 2004-05 school year, the student made progress with respect to his language skills. Tr. 436-40. His mean length of utterance increased and he displayed increased conversational skills. Tr. 436-40. Ms. Long testified also that the speech-language goals and objectives in the April 2004 IEP were appropriate for the student and that he had met all of them as written at the time of the due process hearing. Tr. 443-44.
35. Kimberly Burns testified for the district. Tr. 345. Ms. Burns is the district's Reading Recovery teacher. Tr. 345. She informally assessed the student's reading skills and prepared a written report of that assessment. Ex. R-39 at 350; Tr. 683-92. Ms. Burns' conclusion with respect to the student's reading was that, overall, he read at a beginning first grade level. Tr. 369. In Ms. Burns' opinion, the biggest restriction on the student's reading progress is his limited oral language. Tr. 370. As Ms. Burns stated, if the student is unable to say a word, then he is unable to read or write that word. Tr. 370. In addition, the student's short-term memory issue makes it more difficult for him to learn to read. Tr. 370. As a result of her assessment, Ms. Burns recommended that a phonics-based approach not be used exclusively with the student. Rather, she agrees with the shift to a functional reading approach and believes that the Reading Milestones program

is appropriate for the student. Tr. 373-74. Ms. Burns stated that the student is capable of becoming a functional reader, but it is not an appropriate expectation to bring his reading up to grade level. Tr. 375-76.

36. Bonnie Leuwerke was the student's teacher for his special education transition class during the 2004-05 school year. Tr. 476-77. Ms. Leuwerke has a Bachelor's degree in education, a Master's degree in educational administration and is certified by the State to teach special education. Tr. 479. She has ten years of experience in education. Tr. 480.
- The transition class has a curriculum that addresses job readiness, career exploration, and team building. Tr. 478. The class convenes five days a week for one class period per day and has 5-10 students enrolled. Tr. 79. During the class, Ms. Leuwerke addresses the student's needs in the areas of speech, language, reading, writing and math. Tr. 478. Ms. Leuwerke testified that the student would be harmed if he were to be removed from that class for the increased time the parent is seeking in a traditional academic environment. Tr. 479, 482.
37. Dave Tyler also testified on behalf of the district. Tr. 493. Mr. Tyler is the Process Coordinator for the Camdenton High School, has been employed by the district for 18 years and has a total of 30 years of experience in public education. Tr. 493-94. Mr. Tyler serves as the student's case manager. Tr. 494. Mr. Tyler testified that the student received some 1:1 attention in all of his classes during the 2004-05 school year. Tr. 496. He further testified that, in his opinion, the student's IEP contained a proper allocation of minutes in transition, speech-language and academic instruction and that the student did not require more 1:1 time. Tr. 496. During the 2004-05 school year, Mr. Tyler observed

the student's progress. More specifically, he observed that the student is more conversational and has begun leading conversations. Tr. 495.

38. Tammy Hutchison-Lupardus, the district's Director of Special Services, testified. Tr. 500. Ms. Lupardus has a Bachelor's Degree in elementary and special education, a Master's Degree in educational administration and a specialist's degree. Tr. 501. Ms. Lupardus attended two IEP meetings for the student. Tr. 501. She testified with respect to the dispute with the parent over the student's speech-language minutes and stated that, at the parent's request, the team had increased his minutes in speech-language therapy. Tr. 532-33. At the time, the district's professional staff believed that a decrease in therapy time was more appropriate because of the student's increased resistance. However, during the 2003-04 school year and based on parental request, the team agreed to increase the minutes and to collect data to see if there was a correlation between increased therapy time and progress. The data demonstrated that no greater progress occurred. Tr. 533. Ms. Lupardus testified that, in her opinion, the April 2004 IEP contained the optimal number of minutes in therapy based on the student's progress during the implementation of that IEP as well as the collected data. Tr. 533.

CONCLUSIONS OF LAW

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400, *et seq.*, and Missouri law, §162.961, RSMo. This Hearing Panel has jurisdiction pursuant to 20 U.S.C. §1415 and §162.961, RSMo.

The burden of proving compliance with the IDEA is on the school district. According to the United States Court of Appeals for the Eighth Circuit, which governs the federal courts in Missouri: “At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA.” *E.S. v. Independent Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). The burden of proof is on the district for procedural as well as substantive issues. *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1498 (9th Cir. 1996) (appropriateness of evaluation and placement).

The United States Supreme Court has described the determination of whether a public entity has complied with the IDEA as requiring a two-part analysis:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982) (footnotes omitted).

I. Procedural Issues

Two of the issues raised by the parent in this case are purely procedural in nature:

- Whether the district violated the IDEA by not calling off the April 2004 IEP meeting at parent request, and
- Whether the district violated the IDEA by not allowing the parent to tape record the April 2004 IEP meeting.

The parent sought to raise another procedural issue that in some circumstances could rise to the level of a violation of the IDEA, whether Tammy Lupardus, the district's special education

director, failed to respond to the parent in a positive matter. As stated above (*see* footnote 1, and accompanying text, above) the parent did not claim that Ms. Lupardus's alleged manner of responding to her interfered with the parent's right to participate in the development of the student's educational programs. Had a school district administrator's behavior interfered with the parent's right to participate, it could have been a violation of the IDEA. There was no allegation or evidence that it did in this case.

Under the first part of the *Rowley* analysis, a hearing panel can set aside an educational program on procedural grounds in any one of three circumstances: (1) when the procedural inadequacies have "compromised the pupil's right to an appropriate education," (2) when the district's conduct has "seriously hampered the parent's opportunity to participate in the formulation process," or (3) when the procedural failure has resulted in "a deprivation of educational benefits." *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir. 1996). Where a school district has "failed to develop the IEP according to the procedures required by the Act," resulting in the kind of harm described above, the hearing panel "need not address the question of whether" the resulting IEP "was reasonably calculated to enable [the student] to receive educational benefits." *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9th Cir. 1991). A school district's failure to develop an IEP "in accordance with the procedures mandated by the IDEA" may, "in and of itself" deny the student a free appropriate public education. *Amanda J. v. Clark County Schl Dist.*, 267 F.3d 877, 895 (9th Cir. 2001).

The procedural issues raised by the parent involve her right to participate in the process of developing the student's individualized education program (IEP). An IEP is "a

comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” *School Committee of Burlington v. Massachusetts Dept of Ed.*, 471 U.S. 359, 368 (1985). The Court in *Burlington* described the IEP as the “*modus operandi* of the Act.” *Id.* The IDEA regulations address parent participation in the IEP process and provide that “[e]ach public agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including – (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend.” 34 C.F.R. §300.345. In addition, the same regulation provides that “[a] meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend.” *Id.*

The parent contends that the district violated the IDEA by not calling off the April 2004 IEP meeting at her request because one of her advocates was unable to attend. District personnel informed the parent that they would continue with the April 2004 IEP meeting even if she chose to leave. Under the IDEA parents have a right to bring to IEP meetings, “individuals who have knowledge or special expertise regarding the child.” 20 U.S.C. §1414(d)(1)(B)(vi); 34 C.F.R. §300.344(a)(6). Those provisions clearly include the right of parents to bring advocates with them to IEP meetings. The district points out that it provided proper notice to the parent of the meeting and the meeting was rescheduled at the parent’s request and at a time that was convenient for her. More importantly, however, the parent attended the meeting and participated in it along with four other individuals who attended at her request. Under the particular circumstances of this case, the panel finds that the district’s decision to proceed with the IEP

meeting, when one of the parent's several invited advocates was unable to attend, did not "compromise the pupil's right to an appropriate education," "seriously hamper the parent's opportunity to participate in the formulation process," or result in "a deprivation of educational benefits." The district's conduct, therefore, did not constitute a violation of the IDEA that would allow or require the panel to invalidate the resulting IEP.

The panel also finds that the district did not violate the IDEA when it refused the parent the opportunity to tape record the April 2004 IEP meeting. Neither the IDEA nor the Missouri State Plan for Part B of the IDEA provides parents with the right to tape record. Appendix A to the federal IDEA regulations provides, in pertinent part, as follows:

Part B does not address the use of audio or video recording devices at IEP meetings,
and no other Federal statute either authorizes or prohibits the recording of an IEP meeting by either a parent or a school official. ***Therefore, an SEA or public agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings.***

Appendix A at Question 21 (emphasis added). Clearly, this statement, standing alone, authorized the district to prohibit the parent from tape recording IEP meetings.

Moreover, although the regulation cited above does not require a district to have a tape recording policy, the district presented evidence that it did have such a policy and that the policy was provided to the parent. Finally, the parent presented no evidence that supported a finding that she needed to tape record the meeting to exercise her parental right of participation.

II. Substantive Issues

The substantive issues raised by the parent involve the nature, quantity, and quality of the educational services provided by the district:

- Whether the IEP denied the student an appropriate education because it provides too much time in transition activities and not enough time in
 - speech and language therapy, and
 - special education for reading, writing, spelling, and math;
- Whether the district violated the student's rights under the IDEA because the speech and language service provider was not licensed;
- Whether the district denied the student an appropriate education because it provided reading instruction that was not appropriate to meet the student's needs; and
- Whether the district denied the student an appropriate education by not providing more 1-1 instruction.

In deciding the substantive issues, the second prong of the *Rowley* test, the hearing panel must determine whether the individualized educational program in question provides the student an "appropriate" education. The IDEA defines the term "free appropriate public education" as:

special education and related services that - (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(8). By defining an appropriate education as "special education," Congress requires that school districts provide "specially designed instruction . . . to meet the unique needs of a child with a disability." 20 U.S.C. §1401(25) (definition of "special education"). *See*

Rowley, 458 U.S. at 188-89. The regulations adopted by the United States Department of Education to implement the IDEA further emphasize the need to focus on the individual needs of each child. The regulations define “specially-designed instruction” to mean:

adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction--(i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. §300.26(b)(3). Accordingly, the district was required to consider the specific and unique characteristics of the student’s disability. *Strawn v. Missouri State Board of Educ.*, 210 F.3d 954 (8th Cir. 2002) (communication needs of student with multiple disabilities).

Furthermore, according to the Supreme Court in *Rowley*, “appropriate” services are those that are “reasonably calculated to enable the child to receive educational benefits.” 458 U.S. at 192, 206-07. Under those standards, therefore, the substantive issues in this case are whether the district’s April 2004 IEP met the student’s unique needs and were reasonably calculated to provide him educational benefits.

In this case, the school district’s evidence established by a preponderance of evidence that the April 2004 IEP provided the student a free appropriate public education. The evidence at hearing was undisputed that the goals and objectives and the special education and related services offered and provided pursuant to that IEP were individually designed and reasonably calculated to provide the student with meaningful educational benefit. The district staff testified that the goals and objectives addressed each of the areas of deficit resulting from the student’s identified disability and the parent agreed with that testimony. Moreover, the evidence was undisputed that

the student was making greater progress under the April 2004 IEP than under any prior IEP.

The panel also finds that the allocation of services for transition, speech-language therapy and academics was appropriate for the student. The parent provided no evidence to support her position that the student required a greater amount of time in a traditional academic setting and less time in transition activities. In contrast, the district provided substantial evidence that, given the nature of the student's disability and his age, it is imperative that his education continue to focus on transition and functional services. That conclusion was also supported by the independent evaluations obtained by the parent at the University of Missouri. Moreover, the evidence submitted by the district clearly established that the speech-language therapy services for the student in the April 2004 IEP were appropriate. The student made more than meaningful progress in those areas after implementation of the April 2004 IEP and the district presented evidence that all staff working with or interacting with the student were reinforcing his speech-language skills throughout the school day. Further, the district presented evidence that showed that when a greater number of minutes per day was implemented, the student did not increase his level of progress.

Two of the issues raised by the parent in this case challenge the methodology or the particular educational approach chosen by the school district. The parent contended that the student should be taught reading with a phonics based program and that the district should provide more one-on-one instruction to the student in all areas. The school district argued that educational methodology must be left to the educators and not determined solely by the

preferences of parents. That may be true when there are two or more methodologies that would provide an appropriate education to the student. Where a particular methodology is an integral part of what is individualized about a student's education, it would need to be incorporated into the student's IEP. The IDEA regulations require “adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction--to address the unique needs of the child.” 34 C.F.R. §300.26(b)(3). Commenting on the adoption of that provision in 1999, and the court decisions that preceded it, the United States Department of Education stated:

Case law recognizes that instructional methodology can be an important consideration in the context of what constitutes an appropriate education for a child with a disability. At the same time, these courts have indicated that they will not substitute a parentally-preferred methodology for sound educational programs developed by school personnel in accordance with the procedural requirements of the IDEA to meet the educational needs of an individual child with a disability.

In light of the legislative history and case law, it is clear that in developing an individualized education, there are circumstances in which the particular teaching methodology that will be used is an integral part of what is “individualized” about a student's education and, in those circumstances will need to be discussed at the IEP meeting and incorporated into the student's IEP. For example, for a child with a learning disability who has not learned to read using traditional instructional methods, an appropriate education may require some other instructional strategy.

64 Fed. Reg. 12552 (1999) (emphasis added).

The panel finds, however, that the reading instruction provided to the student was appropriate to meet his needs and that the phonics-based approach that the parent was seeking, from Sylvan Learning Center or the district, is not appropriate for him. The evidence presented by both parties at the hearing demonstrated that, because of the nature of the student’s disability, a phonics-based approach that is primarily auditory in nature was not appropriate and that the language-based approach, such as Reading

Milestones, and a more functional approach to reading are now necessary for the student.

The panel also concludes that the student did not and does not require more one-on-one instruction. Again, the parent provided no evidence to support her position and the district presented evidence to establish that the services provided pursuant to the April 2004 were appropriate. The evidence also supports a finding that the student's language skills improve more in a situation in which peers are present.

Decision:

The hearing panel has considered the evidence presented by both parties at the hearing and a majority of the panel finds in favor of the Camdenton R-III School District with respect to the six issues raised by the parent. The panel majority consists of the Chairperson, Kenneth M. Chackes, and Panel Member George Wilson, as indicated by their signatures below. The third Panel Member, Margie Garanzini-Daiber, will submit a separate minority opinion at a later date.

APPEAL PROCEDURE

This is the final decision of the Department of Elementary and Secondary Education in this matter. Either party has a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, §§536.010 *et seq.* RSMo. The parties also have a right to file a civil action in federal or state court pursuant to the IDEA. *See* 20 U.S.C. §1415(i).

Dated: July 22, 2005

Kenneth M. Chackes
Chairperson

Margie Garanzini-Daiber
Panel Member

George Wilson
Panel Member

Copies of this decision will be mailed to the parties on this date, by certified mail, return receipt requested.